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In the Supreme Court of the United States

OCTOBER TERM, 1960.

No. 899.

WILLIAM COLE,

Petitioner,

vs.

DOOR COUNTY MEMORIAL HOSPITAL,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the Court of Appeals, Eighth Appellate District of Ohio.

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OPINIONS BELOW.

The Municipal Court of Cleveland rendered no opinion.

The opinion of the Court of Appeals for the Eighth Appellate District of Ohio is not reported and is set forth in the Appendix hereto at page 7 together with the Mandate of the Supreme Court of Ohio overruling the Defendant-Appellant's motion to review the decision of the Court of Appeals and the judgment of the Court of Appeals that are set forth on pages 9-10 hereof.

JURISDICTION.

Is based upon the provisions of Title 28 U. S. C. A. Sec. 1257 (3) and Title 46 U. S. C. A. Sec. 601.

QUESTION PRESENTED.

May an American seaman's wages be arrested or attached in garnishment proceedings even tho the judgment against the seaman covers medical expenses in behalf of his wife and minor child?

THE STATUTE INVOLVED.

"Attachment or Arrestment of Wages; Support of Seaman's Wife."

"No wages due or accruing to any seaman or apprentice shall be subject to attachment or arrestment from any court, and every payment of wages to a seaman or apprentice shall be valid in law, notwithstanding any previous sale or assignment of wages or of any attachment, encumbrance, or arrestment thereon; and no assignment or sale of wages or of salvage made prior to the accruing thereof shall bind the party making the same, except such allotments as are authorized by this title. This section shall apply to fishermen employed on fishing vessels as well as to seamen: *Provided*. That nothing contained in this or any preceding section shall interfere with the order by any court regarding the payment by any seaman of any part of his wages for the support and maintenance of his wife and minor children. Mar. 4, 1915, c. 153, Sec. 12, 38 Stat. 1169."

Title 46, U. S. C. A. Sec. 601.

Originally enacted in one section in 1872, the statute was amended in 1915 by the addition of the words beginning with "Provided."

The first section of 1872 has been interpreted by this Court in *Wilder vs. Inter-Island Steam Navigation Company*, 211 U. S. 239 and has never been modified.

The effect of the second section, beginning with the word "Provided" is the sole question before the Court for decision.

STATEMENT OF THE CASE.

In a garnishment proceeding, the Door County Memorial Hospital of Sturgeon Bay, Wisconsin, in the Municipal Court of Cleveland, Ohio, recovered a judgment of $378.29 against one William Cole, a seaman in the employ of the Tomlinson Fleet Corporation that operates a fleet of ore carriers on the Great Lakes. The judgment covered the amount of the hospital's charge for treatment of the seaman's wife and child.

The judgment debtor, seaman Cole, appealed that part of the judgment concerning the garnishment order. The Court of Appeals for the Eighth Appellate District of Ohio affirmed the Municipal Court. The Supreme Court of Ohio within its discretion refused to review the Appellate Court's decision in a Motion To Certify The Record of the Court of Appeals. Hence, as the Supreme Court of Ohio refused to exercise its discretionary power of review, the petition prays that the Writ for Certiorari be directed to the Court of Appeals of the Eighth Ohio Appellate District.

REASON FOR GRANTING THE WRIT.

This is the first and only case on record sustaining garnishment of a seaman's wages that we can find in the maritime history of the United States. The decision of the Court of Appeals of Ohio is in direct conflict with the provisions for the Protection of Seamen contained in Title 46 U. S. C. A. Sec. 601 and therefore the question involved would appear to be of general and highly important interest not only to seamen, but to the shipping industry of the entire nation. At this posture of the case the law of the State of Ohio permits arrestment, attachment, garnishment of a seaman's wages. For time out of mind, such

arrestment has been prohibited by the general maritime law. The law of the sea is the measure of maritime rights and obligations.

ARGUMENT.

The provisions of the quoted statute have been considered in two jurisdictions—the only cases to be found on the subject.

In *Cunningham vs. McCullough,* Misc. 1940, 22 N. Y. S. 2d 739, the Court held:

> "On motion under Civil Procedure Act N. Y. Sec. 894, providing for order permitting or directing person indebted to pay debt to sheriff or judgment creditor injunctive proceedings would be vacated, where wages of seaman were involved, and judgment, altho apparently for board and lodging of daughter of a seaman was not an order by any court regarding the payment of any part of his wages for the support of his wife and minor children, within this section, 'since section refers to orders such as may be made in matrimonial action or by Court having jurisdiction to make similar orders, such as Domestic Relations Court of City of New York.' U. S. C. A. Title 46, Sec. 601, p. 375."

Again, in *Avilla vs. Avilla* (1947) 183 P. 2d 668, in considering the attempted attachment, attachment of a seaman's wages, the Court held that an order incorporated in a decree of divorce, for example, as distinguished from attachment proceedings and the like, is such an order that permits execution.

Hence it seems clear that a *judgment,* as entered in the instant case, is distinguished from an *order* such is contemplated in the amendment to the original statute.

Obviously no such order is involved herein.

If "any court" in *garnishment* proceedings, as herein, may order a judgment paid, the first section of Title 46, U. S. C. A. Sec. 601 prohibiting garnishment is a nullity and may as well be repealed.

If Congress in the amendment of 1915 had intended to modify the injunction against arrestment of wages, surely the simple and logical procedure would have been to word the amendment:

> "Nothing in the foregoing shall apply to the garishment or arrestment of seaman's wages in cases involving the support and maintenance of a seaman's wife and minor children."

But instead, Congress provided for an *order* of a court.

> "As a general rule judgments are to be distinguished from orders or rules; one does not include the other."
>
> 11 Ohio App. 410.

The entry of the Municipal Court in the instant case is as follows:

> "Parties in court: Trial had: Court finds and renders judgment for plaintiff against defendant for $378.24. Attachment sustained: garnishee ordered to pay into court amount sufficient to satisfy judgment and costs."

Surely a unique entry. No court is empowered to render more than a judgment. But the Court, intrigued by the word "order" in the statute, makes an order as to whom the proceeds of the judgment must be paid. Obviously this was for the purpose of circumventing the provisions of the first section of the statute. But the "order" is made in a *garnishment* proceeding, which is strictly prohibited.

It is submitted that the law as promulgated by the Statute and interpreted by the Supreme Court still pro-

hibits attachment or garnishment of a seaman's wages, in spite of the provision for the validity of an *order* of the court in cases of support for a seaman's wife and children.

That the Petition should be granted is respectfully submitted.

LUCIAN Y. RAY,
Counsel for Petitioner.

RUSSELL V. BLEECKER,
WILLIAM F. STEINER.
Of Counsel.

APPENDIX.

JUDGMENT OF THE MUNICIPAL COURT.

Mar. 7, 1960:

The Court finds that there is due pltff. from deft. the sum of $378.24; that there is property (money) attached herein, wherefore it is ordered that attachment be sustained and that pltff. recover said sum of $378.24 out of property (money) attached herein and also costs of suit.

FRANK T. KELLY, BAILIFF.

J. KILCOYNE, *Deputy*.

OPINION OF THE COURT OF APPEALS.

HUNSICKER, J.

William Cole, Sr., employed as a seaman by Tomlinson Fleet Corporation, was sued by Door County Memorial Hospital of Sturgeon Bay, Wisconsin, in the Municipal Court of Cleveland, Cuyahoga County, Ohio, for hospital and medical services rendered his wife and minor child. Attachment of the wages of Mr. Cole was made by service upon Tomlinson Fleet Corporation, his employer. A judgment was rendered against Cole for the medical and hospital service rendered his wife and children and an order was issued to his employer to pay the money to the court.

It is from the order to pay into court the wages of Mr. Cole held by Tomlinson Fleet Corporation that an appeal is now before us. Mr. Cole says the trial court was without authority to issue an order against his wages as a seaman.

To sustain the contention of Mr. Cole there is cited to us 46 U. S. C. A., Section 601, which reads as follows:

> "No wages due or accruing to any seaman or apprentice shall be subject to attachment or arrestment from any court, and every payment of wages to a seaman or apprentice shall be valid in law, notwithstanding any

previous sale or assignment of wages or of any attachment, encumbrance, or arrestment thereon; and no assignment or sale of wages or of salvage made prior to the accruing thereof shall bind the party making the same, except such allotments as are authorized by this title. This section shall apply to fishermen employed on fishing vessels as well as to seamen: *Provided*. That nothing contained in this or any preceding section shall interfere with the order by any court regarding the payment by any seaman of any part of his wages for the *support and maintenance* (Emphasis ours) of his wife and minor children."

It is to be noted that the last sentence of this section as above quoted in *effect* gives to a court authority to make an "order" against a seaman's wages for the "support and maintenance of his wife and minor children." It does not matter whether such order is made direct against the seaman or to his employed, as in the case before us. *Avilla v. Avilla*, 183 P. 2d 668; *Michenheim v. Cathcart*, 84 So. 2d 449; 56 *A. L. R.*, Wages of Seaman, 628.

It is a part of a husband's natural obligation that he support his wife and children with the necessaries of life in accord with the station in life occupied by such family. The legal sense of the words "support" and "maintenance" is the same as the understanding of them in every day life subject to the qualification above stated.

The phrase "support and maintenance" when used with reference to persons includes medical and hospital service. 54 *C. J. S.* 905; 50 *American Jurisprudence*. Support of Persons, par. 2, page 870; and in such sense it was used in Section 601 of 46 U. S. C. A.

A debtor should not be able to avail himself of a statutory exemption to deprive his wife and minor child of medical and hospital care when such law of exemption,

with its exception provision, was designed for the protection of a wife and minor children.

We therefore determine that where a valid judgment is rendered against a seaman for medical and hospital service to his wife and minor child, an attachment of wages due the seaman may be made to enforce collection of that judgment since such medical and hospital service falls within the exception to exemption of a seaman's wage under paragraph 601 of 46 U. S. C. A. as being "support and maintenance of his wife and minor children."

The judgment herein must be affirmed.

Judgment affirmed.

DOYLE, P. J., GRIFFITH, J. Concur.

(DOYLE, P. J., HUNSICKER, J., of the Ninth District, and GRIFFITH, J., of the Seventh District, sitting by designation in the Eighth District.)

JOURNAL ENTRY OF THE COURT OF APPEALS.

December 20, 1959:

This cause came on to be heard on the appeal of questions of law from the judgment of the Municipal Court of Cleveland, and was argued by counsel for the parties; and upon consideration the court finds no error prejudicial to the appellant and therefore the judgment of the said Municipal Court of Cleveland is affirmed, and it is ordered that Appellee recover from Appellant its costs herein taxed.

The court finds there was reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing said Municipal Court of Cleveland to carry this judgment into effect.

MANDATE OF THE SUPREME COURT OF OHIO.

March 8, 1961:

Motion for an Order Directing the Court of Appeals of Cuyahoga Cou[illegible]y to Certify its Record.

It is ordered by the Court that this motion be, and the same hereby is, overruled.

OPINION IN THE CASE OF CUNNINGHAM v. McCULLOUGH, 22 N. Y. S. 2d 739.

City Court of New York, New York County.

June 10, 1940.

1. Injunction.

The prevention of payment of ordinary wages by injunction under statute enjoining transfer of property by judgment debtor or third party would be improper. Civil Practice Act, § 781.

2. Exemptions.

A judgment against seaman, which was apparently for board and lodging of daughter of seeman, was not an "order by any court regarding the payment by any seaman of any part of his wages for the support of his wife and minor children" within federal statute providing that prohibition against attachment or arrestment of seaman's wages should not interfere with such an order, since statute referred to orders such as might be made in matrimonial action or by court having jurisdiction to make similar orders, such as Domestic Relations Court of the City of New York. 46 U. S. C. A. § 601.

See Words and Phrases, Permanent Edition, for all other definitions of "Order Regarding Payment by Seaman of His Wages for Support of His Wife and Children."

3. Execution.

On motion under statute providing for order permitting or directing person indebted to pay debt to sheriff or judgment creditor, injunctive provisions of third-party subpoena would be vacated, where wages of seaman were involved, and judgment, although apparently for board and lodging of daughter of seaman, was not an "order by any court regarding the payment by any seaman of any part of his wages for the support of his wife and minor children" within federal statute providing that prohibition against attachment or arrestment of seaman's wages should not interfere with such an order. Civil Practice Act, §§ 781, 794; 46 U. S. C. A. § 601.

Supplementary proceedings by one Cunningham against one McCullough. On motion made under Section 794 of the Civil Practice Act, wherein the American Export Lines, Incorporated, was named as the third party.

Motion denied.

Michael H. Grae, of St. George, for judgment creditor.

Haight, Griffin, Deming & Gardner, of New York, for third party American Export Lines, Inc.

COLEMAN, Justice.

[1-3] The application concerns the wages of a seaman. If ordinary wages were involved, it would be improper to prevent their payment by an injunction under Section 781 of the Civil Practice Act. See D., L. & W. Coal Co. v. Kenlon, 164 Misc. 32, 297 N. Y. S. 126. And the federal statute exempting wages of seamen must also be reckoned with. 46 U. S. C., Sec. 601, 46 U. S. C. A. § 601. The judgment creditor misconstrues the last sentence of Section 601. The judgment which she obtained, although

apparently for board and lodging of a daughter of the judgment debtor, is not an "order by any court regarding the payment by any seaman of any part of his wages for the support * * * of his wife and minor children." That provision refers to orders such as might be made in a matrimonial action or by a court having jurisdiction to make similar orders, such as the Domestic Relations Court of the City of New York. Upon request of the third party the injunctive provisions of the third party subpoena dated April 1, 1940, directed to American Export Lines, Inc., are vacated. Cf. Burns v. Fred L. Davis Co., 1 Cir., 271 F. 439.

Motion made under Section 794 of the Civil Practice Act is denied.

OPINION IN THE CASE OF AVILLA V. AVILLA, 183 P. 2d 668.

Civ. 3664.

District Court of Appeal, Fourth District; California.

Aug. 13, 1947.

1. Exemptions.

The primary purpose of a statute of exemption from execution is to secure the exempted property to the use and benefit of the debtor and those dependent upon him, and as a part of that purpose a decree for alimony stands on a different basis than an ordinary debt and in such a case, unless the statute clearly provides to the contrary, the exemption will not apply.

2. Exemptions.

An order for support of divorced wife and child of commercial fisherman on the high seas incorporated in divorce decree, and order of execution on wages of the fisherman for delinquent payments of support, constituted an "order by any court" within exception of the exemption

statute, and exemption from execution was properly denied where allowance thereof would interfere with the support order. 46 U. S. C. A. § 601.

See Words and Phrases, Permanent Edition, for all other definitions of "Order of Any Court."

Appeal from Superior Court, San Diego County; Charles C. Haines, Judge. Affirmed.

Action by Mary Avilla against Carl S. Avilla wherein a decree of divorce was entered in favor of plaintiff. From an order denying a claim of exemption from execution, defendant appeals.

Order affirmed.

Ruel Liggett, of San Diego, for appellant.

Edgar B. Hervey, of San Diego, and Henry F. Walker, of Los Angeles, for respondent.

BARNARD, Presiding Justice.

This is an appeal from an order denying a claim of exemption by a maritime fisherman.

A decree of divorce was entered in this action in favor of the plaintiff, giving her custody of a minor child. In accordance with an agreement of the parties, incorporated in that decree the plaintiff was further awarded $150 per month for the support of herself and the child. The defendant having become delinquent in those payments to the amount of $2,639.23, and the matter having been properly presented, the court ordered an execution to issue in the amount of the delinquency.

The defendant was employed on a fishing vessel engaged in commercial fishing on the high seas. His earnings consisted of a proportionate share of the proceeds of the "catch." The execution thus issued was served upon the

captain of this fishing vessel, who responded that he was indebted to the defendant in the amount of $246.38. The defendant filed a notice and an affidavit claiming exemption under the provisions of Section 601, Title 46 U. S. C. A., in that he was earning his living by fishing on the high seas, and also claiming exemption under the provisions of Sections 690.10 and 690.11 of the Code of Civil Procedure. Thereafter, the defendant moved the court to release the money tied up by the service of this execution, on the ground of such an exemption. After a hearing, the court entered an order releasing $300 to the defendant, and denying his motion as to all amounts over that sum. From this order the defendant has taken this appeal.

This appellant contends that his earnings as a maritime fisherman constitute wages as that term is used in Section 601 of Title 46, U. S. C. A., and that the levying of the execution here in question does not constitute an "order by any court" within the meaning of the exception provided in the last sentence of Section 601. That sentence reads: "Provided, That nothing contained in this (or certain other sections) shall interfere with the order by any court regarding the payment by any seaman of any part of his wages for the support and maintenance of his wife and minor children."

Although the matter is open to question it will be assumed, for the purposes of this opinion, that the remuneration received by the appellant for his services as a fisherman constitutes "wages" within the meaning of Section 601. The controlling question here is whether the allowance of the exemption here claimed would "interfere" with a court order "regarding the payment by any seaman of any part of his wages for the support and maintenance of his wife and minor children." This question must be answered in the affirmative.

[1] The primary purpose of such an exemption statute is to secure the exempted property to the use and benefit of the debtor and those dependent upon him. Holmes v. Marshall, 145 Cal. 777, 79 P. 534, 69 L. R. A. P. 104 Am. St. Rep. 86, 2 Ann. Cas. 88. As a part of that purpose a decree for alimony stands on a different basis than an ordinary debt and in such a case, unless the statute clearly provides to the contrary, the exemption will not apply Willen v. Willen, 121 Cal. App. 351, 8 P. 2d 942; Rankins v. Rankins, 52 Cal. App. 2d 231, 126 P. 2d 125; Schlaefer v. Schlaefer, 71 App. D. C. 350, 112 F. 2d 177, 130 A. L. R. 1014. In Bruton v. Tearle, 7 Cal. 2d 48, 59 P. 2d 953, 957, 106 A. L. R. 580, it is said: "We have shown that the judgment against defendant is a judgment for alimony. One of the characteristics of such a judgment is that as against said judgment the judgment debtor's earnings are not exempt from execution."

[2] Not only are those principles in accord with public policy in this regard, but the last sentence of Section 601 expressly provides that the exemption of wages contained in that section shall in no way interfere with the order of any court regarding the payment by a seaman of any part of his wages for the support of his family. The original support order was a court order within the exception provided by this statute. The order for an execution and the execution itself were also such orders. There can be no question but that to allow this exemption would "interfere" with these orders made in a divorce case for the express purpose of requiring the appellant to support his family. The situation was clearly within the exception provided in the exemption statute upon which the appellant relies, and clearly supports the court's order in refusing to give effect to that exemption. This view is supported by one of the cases relied on by the appellant. Cunning-

ham v. McCullough, City Ct. N. Y., 22 N. Y. S. 2d 739, 740. While the exemption was there upheld for the reason that the order there in question was not such an order the court, in referring to the last sentence of Section 601, said: "That provision refers to orders such as might be made in a matrimonial action or by a court having jurisdiction to make similar orders, such as the Domestic Relations Court of the City of New York."

The order appealed from is affirmed.

GRIFFIN, J., concurs.